UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ASHLEY WAHL, Plaintiff, v. THE BOEING COMPANY, et al., Defendants.	CASE NO. C20-0467JLR ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

I. INTRODUCTION

Before the court is Plaintiff Ashley Wahl's motion to remand this case to King County Superior Court. (Mot. (Dkt. # 24).) Defendant the Boeing Company ("Boeing") opposes the motion. (Resp. (Dkt. # 28).) The court has considered the motion, the parties' submissions in support of and in opposition to the motion, and the applicable law.

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Being fully advised,[1] the court GRANTS Ms. Wahl's motion to remand this case to King County Superior Court.

II. BACKGROUND

A. Factual Background

Ms. Wahl's father, David Wahl, worked at Boeing's aircraft manufacturing facility (the "Boeing Facility") between 1989 and 1990. (KCSC FAC (Dkt. # 1-4) (sealed) ¶ 12.) Ms. Wahl alleges that Mr. Wahl "was exposed via inhalation and/or dermal contact to chemical products and substances that were utilized in the performance of his duties" at the Boeing Facility. (*Id.* ¶ 14.) Ms. Wahl further alleges that she suffered birth defects as a result of Mr. Wahl's exposure to these chemicals. (*Id.* ¶¶ 71-72.) Ms. Wahl further alleges that Defendant Newco, Inc. ("Newco")[2] supplied Boeing with chemicals to which Mr. Wahl was exposed and which ultimately caused Ms. Wahl's injuries. (*Id.* ¶ 1.) Based on these allegations, Ms. Wahl brings claims for

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[1] Ms. Wahl requests oral argument (*see* Mot. at 1), but Boeing does not (*see* Resp. at 1). Oral argument is not necessary where the non-moving party suffers no prejudice. *See Houston v. Bryan*, 725 F.2d 516, 517-18 (9th Cir. 1984); *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (holding that no oral argument was warranted where "[b]oth parties provided the district court with complete memoranda of the law and evidence in support of their respective positions," and "[t]he only prejudice [the defendants] contend they suffered was the district court's adverse ruling on the motion."). "When a party has an adequate opportunity to provide the trial court with evidence and a memorandum of law, there is no prejudice [in refusing to grant oral argument]." *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (quoting *Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991)) (alterations in *Partridge*). Here, the issues have been thoroughly briefed by the parties, and oral argument would not be of assistance to the court. *See* Local Rules W.D. Wash. LCR 7(b)(4). Accordingly, the court DENIES Ms. Wahl's request for oral argument.

[2] Newco does business as Cascade Columbia Distribution Company ("Cascade"). (*See* Dkt.)

negligence and products liability against Boeing; and for negligence and breach of warranty against Newco. (*See id.* ¶¶ 27-107.)

Ms. Wahl alleges that she "is an incapacitated adult who suffers from Agenesis of the Corpus Callosum, vision problems, and developmental delay." (*Id.* ¶ 10.) Ms. Wahl contends that she is incompetent or disabled to such a degree that she cannot understand the nature of these proceedings. (*Id.* ¶ 11.)

B. Procedural Background

This district is the third forum in the life of this case. Ms. Wahl initially filed a complaint against Boeing in Cook County Circuit Court in the Illinois state court system. (*See* Ill. Compl. (Dkt. # 1-5) (sealed).) The Cook County Circuit Court consolidated Ms. Wahl's case with three related cases (collectively, the "Illinois Case"). (*See* Ill. FNC Order (Dkt. # 1-8) (sealed) at 1.)

Ms. Wahl did not name Newco as a defendant in her initial or amended complaints in the Illinois Case. (*See* Ill. Compl. at 1; Ill. FAC (Dkt. # 1-6) (sealed) at 1; Ill. SAC (Dkt. # 1-7 (sealed) at 1.) On July 1, 2019, after limited discovery on statute of limitations and *forum non conveniens* ("FNC") issues, Boeing filed a motion to dismiss and transfer the Illinois Case on FNC grounds. (*See* Ill. FNC Order at 2-3.) After considering the applicable private and public interest factors, the Cook County Circuit Court concluded that the factors "strongly favor the transfer of [the Illinois Case] to the Washington Superior Court," granted Boeing's motion, dismissed the Illinois Case, and held:

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> Pursuant to Rule 187, if the plaintiffs re-file their cases in the Washington Superior Court within six months, Boeing shall: (a) accept service of process from the relevant court in which each case is re-filed; and (b) waive any argument based on a statute of limitations defense.

(*Id.* at 28-29.)

Ms. Wahl filed a complaint in King County Superior Court on February 24, 2020, naming both Boeing and Newco as defendants. (*See* KCSC Compl. (Dkt. # 1-3) (sealed) at 2.) Ms. Wahl's Washington complaint alleges that Newco is a Washington corporation with its principal place of business in Seattle, Washington. (*Id.* ¶ 4.) Ms. Wahl amended her complaint on March 26, 2020. (*See* KCSC FAC at 26.) Boeing then removed to this district on March 27, 2020. (*See* Not. of Removal (Dkt. # 1) at 10.) In its notice of removal, Boeing contends that this court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because Newco—the only non-diverse defendant—is fraudulently joined. (*See id.* at 4-8.)

Ms. Wahl filed her motion to remand this case to King County Superior Court on April 27, 2020. (*See* Mot. at 21.) The court now considers Ms. Wahl's motion.

III. ANALYSIS

In support of her motion to remand, Ms. Wahl contends that (1) Boeing is judicially estopped from removing this case (*see id.* at 6-7); and (2) even if Boeing is not estopped, this court lacks diversity jurisdiction because Ms. Wahl and Newco are both Washington citizens, and Newco is not fraudulently joined (*see id.* at 7-20). In response, Boeing argues that (1) Boeing is not judicially estopped from removing this case (*see* Resp. at 8-9); and (2) Newco is fraudulently joined because (a) Ms. Wahl's

claims against Newco are time-barred (*see id*. at 10-16); and (b) Ms. Wahl does not plead any actionable claims against Newco (*see id*. at 16-20). The court sets forth the applicable legal standards before analyzing Ms. Wahl's motion.

A. Legal Standards

1. Removal and Remand

Removal of a civil action to federal district court is proper where the federal court would have original jurisdiction over the state court action. *See* 28 U.S.C. § 1441(a). "If it appears that the federal court lacks jurisdiction, however, 'the case shall be remanded.'" *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 143 (2005) (quoting 28 U.S.C. § 1447(c)). District courts have original jurisdiction over an action with both complete diversity of citizenship among the parties and an amount in controversy exceeding $75,000.00. *See* 28 U.S.C. § 1332(a); *see also Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 679 (9th Cir. 2006). Federal courts strictly construe the removal statute and must reject jurisdiction if there is any doubt as to the right of removal in the first instance. *See Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1034 (9th Cir. 2014); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Thus, the defendant has the burden of establishing that removal is proper. *See Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005). Although Boeing has the burden of establishing the grounds for federal jurisdiction, the court is also obliged to satisfy itself that it has subject matter jurisdiction. *See Snell v. Cleveland, Inc.*, 316 F.3d 822, 826 (9th Cir. 2002) (citing Fed. R. Civ. P. 12(h)(3)).

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2. Fraudulent Joinder

Fraudulent joinder is an exception to the requirement of complete diversity. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). "Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, '[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" *Id.* (quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)) (internal alteration in *McCabe*). There is a general presumption against finding fraudulent joinder, and defendants bear a "heavy burden" to establish it. *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 548-49 (9th Cir. 2018). Fraudulent joinder must be proved by clear and convincing evidence. *See Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

A defendant may establish fraudulent joinder in one of two ways: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Grancare, LLC*, 889 F.3d at 548-49 (quoting *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)). A defendant succeeds in the second method if the defendant "shows that an 'individual[] joined in the action cannot be liable on any theory.'" *Id.* (quoting *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998)). However, "if there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court." *Id.* (quoting *Hunter*, 582 F.3d at 1046)).

The tests for fraudulent joinder and for failure to state a claim under Rule 12(b)(6) are not equivalent. *Id.* at 549. "A claim against a defendant may fail under Rule 12(b)(6), but that defendant has not necessarily been fraudulently joined." *Id.* Indeed, the fraudulent joinder standard "is similar to the 'wholly insubstantial and frivolous' standard for dismissing claims under Rule 12(b)(1) for lack of federal question jurisdiction." *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). The stringent standard for fraudulent joinder comports with the presumption against removal jurisdiction, under which federal courts "strictly construe the removal statute," and reject federal jurisdiction "if there is any doubt as to the right of removal in the first instance." *Id.* at 550 (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam)).

3. Judicial Estoppel

Judicial estoppel is an "equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)) (internal quotation marks omitted). Courts invoke judicial estoppel "to prevent a party from gaining an advantage by taking inconsistent positions" and to "protect against a litigant playing fast and loose with the courts." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (quoting *Russell*, 893 F.2d at 1037) (internal quotations omitted). The Ninth Circuit "restrict[s] the application of judicial estoppel to cases where the court relie[s] on, or 'accept[s],' the party's previous inconsistent position." *See Hamilton*, 270 F.3d at 783; *see also Interstate Fire & Cas. Co. v. Underwriters at Lloyd's, London*, 139 F.3d 1234, 1239 (9th Cir. 1998), *as amended* (May 13, 1998) ("A majority of courts apply judicial estoppel only if the court

has relied on the party's previously inconsistent statement, and we have recently adopted that rule.").

The court considers three non-exclusive factors in determining whether to apply the doctrine: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position and the court's acceptance of the later position would lead to the perception that the party misled either court; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *See New Hampshire*, 532 U.S. at 750-51 (citations omitted).

B. Ms. Wahl's Motion to Remand

The court first addresses Ms. Wahl's argument that Boeing is estopped from removing this case before turning to Boeing's argument that jurisdiction is proper because Newco is fraudulently joined.

1. Judicial Estoppel – Removal

Ms. Wahl argues that Boeing is judicially estopped from removing this case in the first instance—regardless of the court's subject matter jurisdiction—on account of certain positions Boeing took in the Illinois Case. (*See* Mot. at 6-7.) Specifically, Ms. Wahl contends that Boeing secured a FNC-based dismissal in the Illinois circuit courts by specifically relying on the comparison between the Illinois circuit courts and the Washington superior courts. (*See id.* at 6 ("In moving for a *forum non conveniens* dismissal in Illinois, Boeing quite clearly intended the state court there to believe that the proposed alternative forum was Washington superior court.").) Ms. Wahl argues that

Boeing invited the Cook County Circuit Court to compare court congestion between Illinois and Washington state courts, and that the Cook County Circuit Court's dismissal of the Illinois Case was based in part on that comparison. (*See id.* at 6-7.) Ms. Wahl further contends that the Cook County Circuit Court would not have ordered FNC-based dismissal had it compared congestion in Illinois state courts to the United States District Court for the Western District of Washington, in which "[f]ive of the district's seven authorized judgeships are vacant, and every vacancy is a judicial emergency." (*Id.* at 6.) Ms. Wahl contends that Boeing made "affirmative use of the processes of a state court" to obtain a tactical advantage and should not now be allowed to "change its position, once it is safely out of the original forum." (*Id.* at 7.)

Boeing relies primarily on *Kidwell v. Maybach International Group*, No. 2:19-cv-149, 2020 WL 897609 (E.D. Ky. Feb. 24, 2020), to counter Ms. Wahl's judicial estoppel argument. (*See* Resp. at 8.) In *Kidwell*, the plaintiff moved to remand a removed case to state court on the ground that the defendants "made explicit representations to the Illinois court that they planned to litigate the suit in the state courts of Kentucky," "base[d] . . . mostly on [the defendants] noting that Boone County Courts heard fewer cases and had a faster resolution time." *Kidwell*, 2020 WL 897609 at *1. The Eastern District of Kentucky held that although the defendants had referenced the Boone County, Kentucky docket, "they never clearly and unequivocally stated that they intended to waive their right to remove or litigate the case to a resolution in Kentucky state courts." *Id.* Boeing contends that *Kidwell* directly applies to this case because like the defendants in *Kidwell*, Boeing "made no representations at all about its legal strategy

in the event Ms. Wahl refiled in Washington." (Resp. at 8.) Boeing further counters Ms. Wahl's argument that Boeing made affirmative use of the processes of a state court by arguing that (1) contrary to submitting to the Cook County Circuit Court's jurisdiction, Boeing's "use" of the Illinois state court system was not a submission to that court's jurisdiction, but rather an attempt to obtain dismissal of the case from that jurisdiction; and (2) Boeing did not make affirmative use of the King County Superior Court because it removed this case within 30 days of service, before answering or otherwise responding to the complaint. (*See id*. at 9.) Finally, Boeing contends that the Cook County Circuit Court found the issue of court congestion to be "neutral," indicating that it was not a major factor in the Cook County Circuit Court's FNC-based dismissal. (*See id.*)

In reply, Ms. Wahl faults Boeing's reliance on *Kidwell*, contending that *Kidwell* addressed the issue of waiver, not judicial estoppel. (*See* Reply (Dkt. # 30) at 1-3.) Ms. Wahl further contends that Boeing did make affirmative use of the Illinois state court system because:

> during the 21 months before it was dismissed, Boeing successfully moved to dismiss [Ms. Wahl's] negligence claim for failure to adequately plead causation (although the court allowed plaintiff to replead), obtained discovery on statute of limitations issues, and filed two separate motions to dismiss on statute of limitations grounds, though both were denied without prejudice.

(*Id.* at 3.) Finally, Ms. Wahl contends that the Cook County Circuit Court relied heavily on Boeing's argument that the case should be transferred not just to Washington but to a specific forum—Washington superior courts—in granting FNC-based dismissal. (*See id.* at 4-6 (noting that the Cook County Circuit Court's order mentions "Washington

Superior Court" 11 times).) In sum, Ms. Wahl argues that having relied on comparing the Illinois state courts to the Washington state courts, and the Cook County Circuit Court having applied the FNC analysis based on that direct comparison, Boeing should be judicially estopped from now removing from the Washington state courts to federal court. (*See id.* at 4-6.)

Having set forth the parties' positions, the court analyzes whether Boeing is estopped from removing this case to federal court by applying the three judicial estoppel factors: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position and the court's acceptance of the later position would lead to the perception that the party misled either court; and (3) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *See New Hampshire*, 532 U.S. at 750-51 (citations omitted).

a. Whether Boeing's Later Position is "Clearly Inconsistent" with its Earlier Position

The first factor weighs against invoking judicial estoppel. Courts generally require that for a position to be "clearly inconsistent," the party must have actually taken a particular position in the first place. Nowhere in the Illinois state court documents filed with this court does Boeing represent that it will not remove a later-filed case to federal court. Although Boeing cited statistics regarding docket congestion in Washington Superior Courts, it never agreed that it would not remove if Ms. Wahl re-filed in

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Washington state court. Therefore, Boeing's current position—that it may remove this case—is not "clearly inconsistent" with a previous position it took.

Ms. Wahl is correct that a party may invoke judicial estoppel to secure a remand in a removed case in some instances. However, the authority Ms. Wahl relies on for that position here undermines her argument. For example, in *Iglesias v. Welch Foods Inc.*, No. 17-CV-00219-TEH, 2017 WL 1227393, at *2 (N.D. Cal. Apr. 4, 2017), the defendants previously took the position that the plaintiffs lacked Article III standing. Defendants then removed the case to federal court, despite acknowledging that the plaintiffs must have Article III standing to remove a case to federal court. *Id.* In contrast to the defendants in *Iglesias*, here Boeing took no position on removal or this court's jurisdiction in the Illinois Case.

b. Whether the Court's Acceptance of Boeing's Later Position Would Lead to the Perception that the Party Misled Either Court

The second factor also weighs against invoking judicial estoppel. Boeing argued the issue of court congestion to the Cook County Circuit Court, which at least implied that FNC-based dismissal was warranted because Washington state courts are less congested than Illinois state courts. (*See* Ill. FNC Order at 26-28.) Boeing's position at least implies that Boeing intended to defend the case in the Washington state court system, not in the heavily congested Western District of Washington. However, Ms. Wahl overstates the importance of this argument to the Cook County Circuit Court's decision to dismiss the Illinois Case. The Cook County Circuit Court ultimately found that the congestion factor was "neutral." (*See id.* at 28.) The Cook County Circuit Court

based its ruling on the other public and private interest factors. (*See id.* at 10-28.) Several of those factors depend solely on geographic location, making it immaterial whether the case is ultimately litigated in Washington state court or Washington federal court. (*See, e.g.*, *id.* at 12 (analyzing the "convenience of the parties" factor and concluding that "each plaintiff lives either in King or Snohomish Counties, Washington; none has ever lived in Illinois"; and holding that it is "obvious" that it is inconvenient for the case to proceed in Chicago); *id.* at 15-18 (holding that the "relative ease of access to evidence factor . . . strongly favors Washington").) Therefore, the Cook County Circuit Court's FNC-based dismissal order strongly suggests that it was not misled by Boeing's congestion-based arguments; or if it was, it had no effect on the court's decision to dismiss the Illinois Case.

c. Whether Boeing Would Derive an Unfair Advantage or Impose an Unfair Detriment if Not Estopped

The third judicial estoppel factor asks whether the party asserting an inconsistent position would receive an "unfair advantage or impose an unfair detriment on the opposing party if not estopped." *See New Hampshire*, 532 U.S. at 751 (citations omitted). Ms. Wahl does not explain how Boeing would derive an unfair advantage by removing this case. (*See generally* Mot.) At most, Ms. Wahl states in conclusory fashion that Boeing "obtained a significant tactical advantage" by litigating this case in Washington instead of in Illinois. (*See id.* at 7.) However, Ms. Wahl does not contend that she will lose any substantive rights to pursue her claims if this case proceeds in federal rather than state court, fails to explain the "significant tactical advantage" Boeing

will gain by litigating in federal court, and fails to explain how any such advantage would be "unfair." (*See generally id*.) Accordingly, the court concludes that this factor weighs against invoking judicial estoppel.

d. Judicial Estoppel Conclusion

In sum, the three judicial estoppel factors weigh against invoking judicial estoppel. Therefore, the court declines to exercise its discretion to invoke judicial estoppel to preclude Boeing from removing this case. *See New Hampshire*, 532 U.S. at 750.

2. Fraudulent Joinder

Although Ms. Wahl is the moving party on her motion to remand, Boeing is the party seeking to invoke the court's subject matter jurisdiction. (*See* Not. of Removal at 2, 4-9.) Therefore, Boeing bears the burden to establish that Newco is fraudulently joined. *See Kroske*, 432 F.3d at 980; *Grancare, LLC*, 889 F.3d at 548-49. Boeing makes two primary arguments in favor of a fraudulent joinder finding: (1) That Ms. Wahl has no viable claim against Newco because the statute of limitations bars any such claim (*see* Resp. at 10-16); and (2) That Ms. Wahl does not plead an actionable claim against Newco because Ms. Wahl's complaint "does not even attempt to specifically identify which workplace chemicals" Mr. Wahl "might have encountered," does not plead that Newco supplied any particular chemical among the broad categories identified, and does not plead that Newco supplied the chemical *and* that it was the cause of her injuries (*id.* at 18).

A defendant may establish fraudulent joinder in one of two ways: "(1) [A]ctual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a

cause of action against the non-diverse party in state court." *Grancare, LLC*, 889 F.3d at 548-49 (quoting *Hunter*, 582 F.3d at 1044). Boeing seeks to establish fraudulent joinder in the second way, meaning Boeing must show that Newco "cannot be liable on any theory." *Id.* (quoting *Ritchey*, 139 F.3d at 1318). However, "if there is a *possibility* that a state court would find that the complaint states a cause of action" against Newco, this court "must find that the joinder was proper and remand the case to the state court." *Id.* (quoting *Hunter*, 582 F.3d at 1046). It is not sufficient for Boeing to establish that Ms. Wahl fails to state a claim against Newco as understood under Rule 12(b)(6), but rather that Ms. Wahl's claim against Newco "is wholly insubstantial and frivolous." *Id.* (citing *Bell*, 327 U.S. at 682-83).

a. Statute of Limitations

The parties do not dispute that the Washington Product Liability Act ("WPLA") provides the statute of limitations that applies to Ms. Wahl's claims against Newco. (*See* Resp. at 10-11; *see generally* Mot.; Reply); *see also* RCW 7.72.060(3) (providing that, subject to certain tolling provisions, "no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause").[3] With respect to minors, the three-year

[3] Ms. Wahl's claims against Newco are for negligence and breach of warranty. (*See* KCSC FAC ¶¶ 98-107.) The parties do not discuss or reference the applicable statutes of limitations for Washington personal injury or warranty claims. (*See generally* Mot.; Resp.; Reply); *see also* RCW 4.16.080(2) (providing a three-year statute of limitations for personal injury claims); RCW 4.16.080(3) (providing a three-year statute of limitations for claims based on contracts not in writing); RCW 62A.2-725 (providing four-year statute of limitations for contracts for sale and not in writing). However, because these additional statutes of limitations provide a maximum four-year limitations period, the court's statute of limitations analysis as it

statute of limitations is "tolled until the victim reaches the age of majority, 18 years." *St. Michelle v. Robinson*, 759 P.2d 467, 468 (Wash. Ct. App. 1988) (citing RCW 4.16.190(1)). Ms. Wahl was born in 1990. (KCSC FAC ¶ 8.) She therefore turned 18 years old in 2008. Boeing argues that the statute of limitations ran in 2011, several years before Ms. Wahl filed her complaint in the King County Case. (*See* Resp. at 11; KCSC Compl. at 25.) Ms. Wahl contends (1) that Boeing waived its statute of limitations argument; and (2) that the statute of limitations is tolled because Ms. Ms. Wahl is incompetent under RCW 4.16.190.

i. Whether Boeing Waived its Statute of Limitations Argument

In dismissing the Illinois Case on FNC grounds, the Cook County Superior Court held:

> Pursuant to Rule 187, if the plaintiffs re-file their cases in the Washington Superior Court within six months, Boeing shall: (a) accept service of process from the relevant court in which each case is re-filed; and (b) waive any argument based on a statute of limitations defense.

(Ill. FNC Order at 28-29.) "Rule 187" refers to Illinois Supreme Court Rule 187(c)(2)(ii), which in turn provides that "[d]ismissal of an action under the doctrine of *forum non conveniens* shall be upon the following conditions . . . (ii) if the statute of limitations has run in the other forum, the defendant shall waive that defense."

Ms. Wahl argues that the Cook County Superior Court ruling quoted above precludes Boeing from arguing that the WPLA's statute of limitations has run with

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applies to Boeing's fraudulent joinder arguments would not change by considering these additional provisions. Therefore, the court declines to consider them.

respect to Ms. Wahl's claims against Newco. (*See* Mot. at 8.) Boeing, in turn, relies on the language of Rule 187 that states "the defendant shall waive that defense" to mean that Boeing waived only *its own* statute of limitations *defense* against Ms. Wahl's claims, not limitations-based arguments for fraudulent joinder based on Ms. Wahl's claims against Newco—which was not a defendant in the Illinois Case. (*See* Resp. at 11-13.)

The parties' dispute presents an interesting question. Rule 187's language favors Boeing. That rule speaks of waiving a statute of limitations defense, not a statute of limitations argument to support an argument for fraudulent joinder. However, although the Illinois Case FNC-based dismissal order cites Rule 187, the order's language is broader than that of the rule. The order states that Boeing shall waive *any argument* based on *a* statute of limitations defense. (Ill. FNC Order at 28-29 (emphasis added).) Because Boeing makes an argument (that Newco is fraudulently joined) based on a statute of limitations defense—albeit Newco's—the plain language of the order precludes Boeing's argument. Although the language of the order and Rule 187 are in tension, this court resolves that tension in favor of the plain language of the order.

ii. Whether Ms. Wahl is Judicially Estopped from Pleading Incompetency

Even if the court considered Boeing's statute of limitations arguments, the court would decline to invoke judicial estoppel to preclude Ms. Wahl from pleading incompetency. Boeing argues that Ms. Wahl waived her right to argue, or is judicially estopped from arguing, that her incompetency tolls the statute of limitations as to her claims against Newco. (*See* Resp. at 13-16.) Boeing contends that (1) Ms. Wahl "did not plead or otherwise raise incompetency or disability" in the Illinois Case, "even though it

could have served as a basis for tolling the applicable statute of limitations" (*see id.* at 15); (2) Ms. Wahl's assertion of the discovery rule in the Illinois Case is "clearly inconsistent" with her claim of incompetency (*see id.* at 16); and (3) Ms. Wahl seeks an unfair advantage by litigating her case for almost two years, then raising incompetency only when it may allow her to remain in her preferred forum, King County Superior Court (*see id.*).

Boeing's judicial estoppel argument fails. The standard for incompetency is statutorily defined in the Revised Code of Washington:

> For purposes of this chapter, a person may be incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

RCW 11.88.010(1)(a). Boeing cites no authority under which invoking the discovery rule against one party precludes invoking incompetency later against another party in a separate action. (*See generally* Resp.) Further, Boeing makes no argument that Ms. Wahl does not meet the statutory definition for incapacitation and provides no authority that invoking incompetency is inconsistent with invoking the discovery rule. (*See generally id.*) Indeed, the two do not appear wholly inconsistent: It may be possible for a party to discover facts that should put them on notice of the claims against a particular party, but still be unable to "understand the nature of the proceedings" and pose "a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." *See* RCW 4.16.190(1); RCW 11.88.010(1)(a).

Therefore, the first judicial estoppel factor—whether Ms. Wahl's later position is "clearly inconsistent" with her earlier position—weighs against invoking judicial estoppel here. *See New Hampshire*, 532 U.S. at 750-51 (citations omitted). For similar reasons, the second factor—whether the party succeeded in persuading a court to accept the earlier position and the court's acceptance of the later position would lead to the perception that the party misled either court—also weighs against invoking judicial estoppel, because Boeing concedes that Ms. Wahl did not raise incompetency in the Illinois Case, where Newco was not a defendant. (*See* Resp. at 15.) Given that the first and second factors weigh strongly against invoking judicial estoppel, the court concludes that it is unnecessary to consider the third judicial estoppel factor and declines to invoke judicial estoppel here.

iii. Whether the Statute of Limitations Prevents Ms. Wahl from Stating a Viable Claim Against Newco

As stated above, Boeing waived its right to raise any statute of limitations-based arguments. However, even if the court considered Boeing's statute of limitations-based arguments for the purpose of fraudulent joinder, they would fail. The standard for establishing fraudulent joinder is more stringent than the standard for prevailing on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Grancare, LLC*, 889 F.3d at 549. Yet even under the more Boeing-friendly Rule 12(b)(6) standard, "the applicability of equitable tolling depends on matters outside the pleadings, so it is rarely appropriate to grant a Rule 12(b)(6) motion to dismiss . . . if equitable tolling is at issue." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003–04

(9th Cir. 2006) (footnote added). In such cases, the court may only grant the defendant's motion "if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *see also Anderson v. Teck Metals, Ltd.*, No. CV-13-420-LRS, 2015 WL 59100, at *2 (E.D. Wash. Jan. 5, 2015) ("A Rule 12(b)(6) challenge 'which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is timebarred,' except for the 'relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint.'") (quoting *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007)). Thus, the court cannot dismiss the complaint unless "[t]he facts necessary to determine the applicability of the discovery rule . . . clearly appear on the face of the complaint." *See Anderson*, 2015 WL 59100 at *2.

Boeing's argument that the running of the statute of limitations for Ms. Wahl's claims against Newco requires a finding of fraudulent joinder does not succeed under the stringent fraudulent joinder standard. Ms. Wahl's operative complaint alleges that Ms. Wahl is "an incapacitated adult who suffers from Agenesis of the Corpus Callosum, vision problems, and developmental delay" and that "[d]ue to her disability, her parents care for her and manage her daily life including her finances, nutrition, health, hygiene and housing." (*See* KCSC FAC ¶ 10.) The complaint further alleges that "pursuant to RCW 4.16.190 the applicable [s]tatute of [l]imitations in this action is tolled because [Ms. Wahl] is 'incompetent or disabled to such a degree that she cannot understand the

nature of the proceedings.'" (*See id.* ¶ 11.) Under RCW 4.16.190, for a person who is "incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to []chapter 11.88 RCW . . . the time of such disability shall not be a part of the time limited for the commencement of action." RCW 4.16.190(1).

The effect of Ms. Wahl pleading incompetency is that it is at least "possible" that she could prove that the statute of limitations was tolled as to her claims against Newco. *See Conerly*, 623 F.2d at 119. Therefore, the running of the statute of limitations does not "clearly appear on the face of the complaint." *See Anderson*, 2015 WL 59100 at *2. Further, Ms. Wahl's positions in the Illinois case upon which Boeing relies to attack the merits of Ms. Wahl's incompetency assertion are matters outside the four corners of the complaint. *See Conerly*, 623 F.2d at 119 (holding that the court may only dismiss an action for failure to state a claim on statute of limitations grounds "if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled").

Even if the court considered Ms. Wahl's positions in the Illinois Case, the incompetency determination Boeing asks this court to make is a merits decision into which the court declines to wade. *See, e.g., id.* As discussed above, it is far from clear that asserting the discovery rule against a defendant in one case is inconsistent with asserting incompetency against a separate defendant in another case, and Boeing presents no authority to that effect. *See supra* § III.B.2.a.ii; (*see also generally* Resp.) It is sufficient for now that Ms. Wahl's incompetency argument is not "wholly insubstantial

and frivolous" and that there is at least a possibility that a Washington state court "would find that the complaint states a cause of action" against Newco. *See Grancare, LLC*, 889 F.3d at 548-49. Therefore, unless Boeing's final argument regarding the viability of Ms. Wahl's claims against Newco succeeds, the court "must find that the joinder was proper and remand the case to the state court." *Id.* (quoting *Hunter*, 582 F.3d at 1046).

b. Identification of Specific Chemicals and Newco's Role in the Complaint

Separate and apart from Boeing's fraudulent joinder arguments based on the statute of limitations, Boeing contends that Newco is fraudulently joined for the independent reason that Ms. Wahl fails to plead any actionable claims against Newco. (*See* Resp. at 16-20.) Boeing identifies two purported deficiencies with Ms. Wahl's claims against Newco: (1) that Ms. Wahl fails to "specifically identify which workplace chemicals" Mr. Wahl "might have encountered" (*see id*. at 18); and (2) Ms. Wahl's complaint does not plead that Newco supplied any particular chemical among the broad categories identified, let alone that Newco supplied the chemical *and* it was the cause of her injuries (*see id.*).

The court evaluates Boeing's challenges to the sufficiency of Ms. Wahl's claims against Newco under Washington State—not federal—pleading standards. *See Grancare, LLC*, 889 F.3d at 548-49 ("[I]f there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.") (quoting *Hunter*, 582 F.3d at 1046). Washington's pleading standards are more relaxed than those set forth in the Federal Rules of Civil Procedure. *See Pac. Nw.*

Shooting Park Ass'n v. City of Sequim, 144 P.3d 276, 281 (Wash. 2006) ("Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought.") (citing Wash. Super. Ct. Civ. R. 8).

The court concludes that it is possible that a Washington state court would find that Ms. Wahl states a viable claim against Newco. *See Grancare, LLC*, 889 F.3d at 548-49. The court finds unpersuasive Boeing's assertion that Ms. Wahl's complaint "does not even attempt to specifically identify which workplace chemicals Mr. Wahl might have encountered" (Resp. at 18) and "does not allege that [Newco] supplied the 'relevant product'" that caused her injuries (*id.* (quoting RCW 7.72.010(3))). Ms. Wahl's complaint specifically alleges that Mr. Wahl was exposed to six categories of chemicals and lists the names of numerous chemicals within those six categories:

> a. Paints, primers, corrosion inhibitors and the constituents contained therein, including: ethylene glycol ether, ethylene glycol ether acetate, chromate a/k/a hexavalent chromium, propylene glycol ether,10-11 Green Primer, LPS3 Corrosion Inhibitor, AV8 Corrosion Inhibitor;
> b. Paint strippers and the constituents contained therein, including: methylene chloride and phenol;
> c. Sealants and the constituents therein, including: lead-based sealants, Sealant 5-95, Sealant 5-45, and Sealant 5-26;
> d. Lubricants and the constituents contained therein, including: Freon, LPS, Boelube, and cetyl alcohol;
> e. Solvents and the constituents contained therein, including: trichloroethylene (TCE), ethylene glycol ethers, methylene chloride, 1-1-1 trichloroethane, Freon, methyl ethyl ketone (MEK), methyl propyl ketone (MPK), phenol, naphtha, benzene, toluene, acetone, xylene, and mineral spirits; and
> f. Other products and the constituents contained therein, including: Isopropyl alcohol (IPA), Dienol, Corban 35, 1000 Body Joint.

(*See* KCSC FAC ¶¶ 15(a)-(f).) The complaint further alleges that Newco "supplied, transported, formulated, re-formulated, mixed, sold and/or distributed some of the

aforementioned chemical and metal products and substances to [Boeing] and its employees" and that Boeing "provided all of the aforementioned chemical products and substances to David Wahl for use at the Boeing Facility." (*Id.* ¶¶ 17-18.)

These allegations are more than sufficient to meet Washington State's more relaxed notice pleading standard. Ms. Wahl's complaint places Newco on notice of the factual allegations against it—that it supplied chemicals to Boeing that injured Ms. Wahl *in utero*. (*Id.* ¶¶ 17-18.) Further, it places Newco on notice of the legal theories against it—negligence and breach of warranty. (*Id.* ¶¶ 98-107.) Further, if there was any doubt whether Ms. Wahl's complaint meets Washington Superior Court Civil Rule 8(a)'s pleading standard, that doubt would be resolved in favor of remand. *See Hawaii ex rel. Louie*, 761 F.3d at 1034; *Gaus*, 980 F.2d at 566. Accordingly, Boeing does not meet its "heavy burden" to establish fraudulent joinder by clear and convincing evidence. *See Grancare, LLC*, 889 F.3d at 548-49.

For the reasons stated above, the court concludes that there is not complete diversity because both Ms. Wahl and Newco are Washington citizens, and Newco is not fraudulently joined. Therefore, this court lacks diversity jurisdiction under 28 U.S.C. § 1332(a). Accordingly, the court GRANTS Ms. Wahl's motion to remand this case to King County Superior Court.

IV. CONCLUSION

For the reasons set forth above, the court GRANTS Ms. Wahl's motion to remand this case to King County Superior Court (Dkt. # 24). The court ORDERS that:

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1. Except for any potential motions for attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c), all further proceedings in this case are REMANDED to the Superior Court for King County, Washington;

2. The Clerk shall send copies of this order to all counsel of record for all parties;

3. Pursuant to 28 U.S.C. § 1447(c), the Clerk shall mail a certified copy of this order to the Clerk for the Superior Court for King County, Washington;

4. Except for any briefs regarding attorneys' fees and costs, the parties shall file nothing further in this matter, and instead are instructed to seek any further relief to which they are entitled from the courts of the State of Washington, as may be appropriate in due course; and

5. The Clerk shall CLOSE this case.

Dated this 12th day of June, 2020.

JAMES L. ROBART
United States District Judge